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No. 632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

ANN B. ROSEMAN LLOYD,

Petitioner,

vs.

ROBERT W. CAMPBELL, EXECUTOR OF THE ESTATE OF CHARLES E. ROSEMAN, JR., DECEASED; MARIA CELESTE LLOYD, A MINOR, BY RALPH STICKLE, HER GUARDIAN AD LITEM; PETER JOHN LLOYD, GUARDIAN OF THE ESTATE OF MARIA CELESTE LLOYD; THE BERKSHIRE MUSIC CENTER, THE MUSICAL ARTS ASSOCIATION, AND WESTERN RESERVE UNIVERSITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

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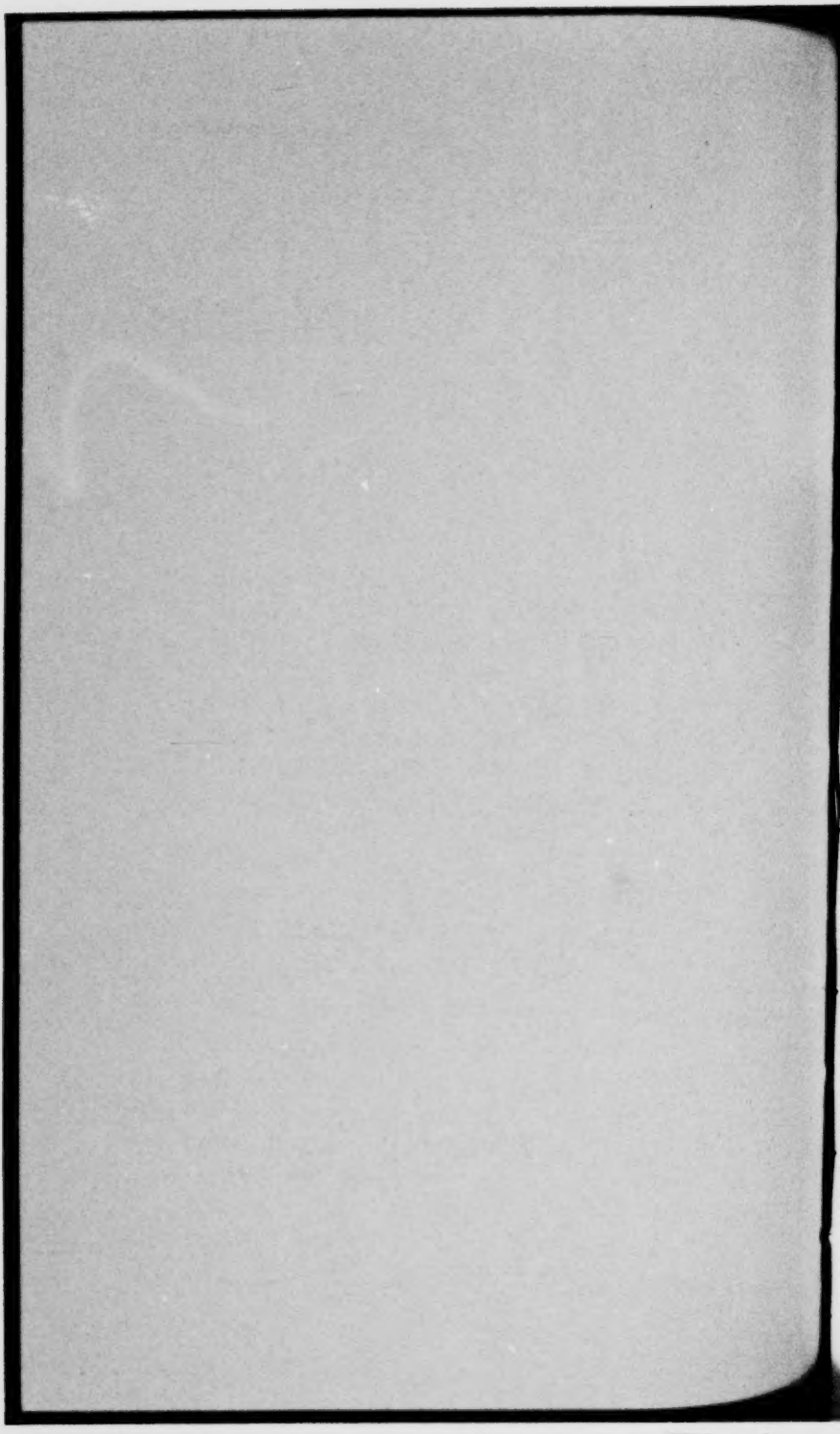

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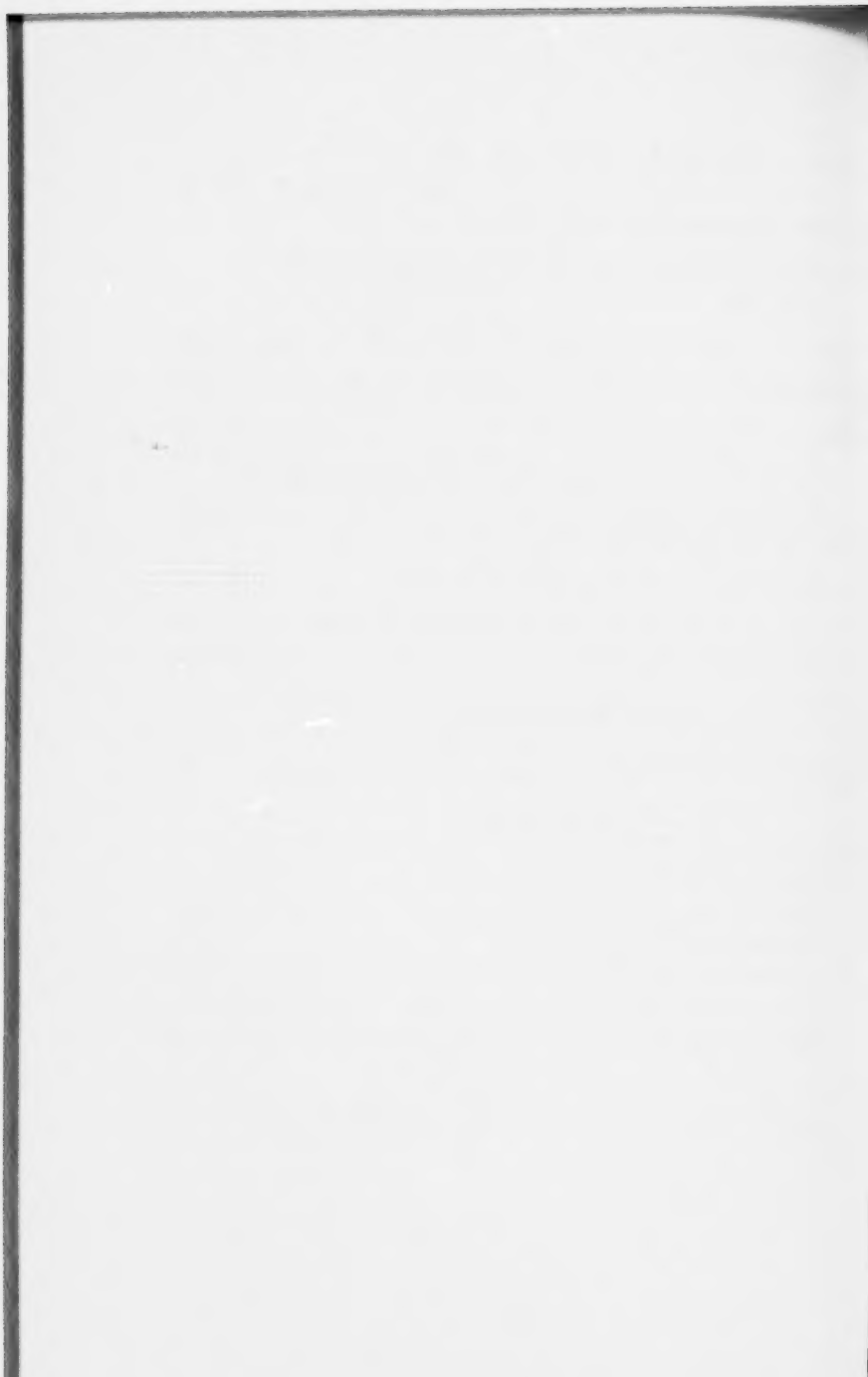

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ROBERT W. CAMPBELL, EXECUTOR OF THE ESTATE OF CHARLES E. ROSEMAN, JR., DECEASED; MARIA CELESTE LLOYD, A MINOR, BY RALPH STICKLE, HER GUARDIAN AD LITEM; PETER JOHN LLOYD, GUARDIAN OF THE ESTATE OF MARIA CELESTE LLOYD; THE BERKSHIRE MUSIC CENTER, THE MUSICAL ARTS ASSOCIATION, AND WESTERN RESERVE UNIVERSITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

To the Honorable Supreme Court of the United States:

Petitioner, Ann B. Roseman Lloyd, respectfully prays that a writ of certiorari issue to the Supreme Court of the

state of Ohio to review the judgment and decision of that court in case No. 33911, entitled **Campbell, Exr., v. Lloyd**, opinion dated November 17, 1954, reported in 162 Ohio St., 203.

A petition for rehearing, filed pursuant to the rules of the Supreme Court of Ohio, was denied without opinion of that court on December 8, 1954. (Record, 41.)

OPINIONS OF THE COURT BELOW.

The decision of the Ohio Supreme Court in **Campbell, Exr., v. Lloyd** overruled that court's earlier decision in **Miller v. Hammond,** decided January 30, 1952, reported in 156 Ohio St., 475, 104 N. E. (2d), 9.

The opinion and judgment of the Ohio Supreme Court in **Campbell, Exr., v. Lloyd** is set forth as Appendix A hereof, and the opinion of that court in **Miller v. Hammond** as Appendix B hereof.

JURISDICTION OF THIS COURT.

The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257 (3), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * * * * *
>
> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * or statutes of * * * the United States."

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QUESTIONS PRESENTED.

Question One:

The United States Revenue Act of 1948 amended the federal estate tax law to allow surviving spouses in all states to take shares of their deceased spouses' estates free of federal estate tax. This was accomplished by inclusion in the amendment of a new provision for a "marital deduction" in the amount of the value of all interests in property passing outright from the decedent to the surviving spouse, provided that such interests do not exceed fifty per cent of the deceased spouse's gross estate. In view of this act of Congress, may the Supreme Court of Ohio, by a decision which misconstrues the federal law, deprive a surviving spouse of the right to receive her share, which qualifies as the marital deduction, free of the federal estate tax?

Question Two:

The Supreme Court of Ohio, in 1952, correctly construed the provisions of the amended federal estate tax law and held that a widow must receive her share of her deceased spouse's estate, when it qualifies as the marital deduction, free of the federal estate tax. The widow in the case at bar acquired vested property rights in reliance upon that decision. When this same court, there being no change in the federal or state law, now overrules its earlier decision and reduces the widow's share by compelling her to pay a portion of the federal estate tax, does the retroactive application of its overruling decision deny the widow these vested property rights without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States?

STATUTES INVOLVED.

The questions presented for review in this case involve the Internal Revenue Act, Title 26, Chapter 3, Estate Tax, as the same was amended by Congress through passage of the United States Revenue Act of 1948. The pertinent portions of this federal act are set forth as Appendix C hereof.

STATEMENT OF THE CASE.

Simply stated, for the purposes of the questions raised, the facts in this case are as follows:

Charles E. Roseman, Jr., died testate in March, 1952. He was survived by his widow and one child. His estate is of such size as to involve the federal estate tax.

Within the time provided the widow elected to take under the Ohio statute of descent rather than her deceased spouse's will. Such election is, under Ohio law, irrevocable. The widow made such election in reliance upon the decision of the Ohio Supreme Court in **Miller v. Hammond**, which had been decided on January 30, 1952.

In that case the Ohio Supreme Court held that the widow, who likewise had elected to take under the law rather than the will, received her share of her deceased spouse's estate free of the federal estate tax.

In **Miller v. Hammond** the widow's intestate share was one-third of her husband's net probate estate. Being obviously less than fifty percent of his gross estate for federal estate tax purposes there was no question but that it qualified as the marital deduction provided by Section 812 (e), Title 26, U. S. Code, and as such passed to her free of federal estate tax in accordance with the Ohio Supreme Court's construction of the federal law in that case.

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In **Campbell, Exr., v. Lloyd**, the widow's share, originating under identical circumstances, was one-half.

The question was raised in the Probate Court as to whether she also received her share free of federal estate tax. In addition to this basic federal question, issue was made as to whether the provision of the Ohio election statute, limiting the widow's share to "not to exceed one-half of the net estate" altered the rule of federal law decided in **Miller v. Hammond.** (R., 1.)

The answer of the widow alleged that Section 812 (e), Title 26, U. S. Code, provided that the transfer of her share should be free from federal estate tax, and that her share as determined by the Ohio election, and descent statutes, qualified as the marital deduction as defined by the federal law. (R., 14.)

The Probate Court construed the federal estate tax as a charge on the entire probate estate, thus destroying the widow's tax free share, and requiring her to pay one-half of the tax. (R., 19-21.)

Upon appeal to the Court of Appeals for Cuyahoga county, Ohio, that court gave consideration to Section 812 (e), Title 26, U. S. Code, and to the construction which had been given it in **Miller v. Hammond.** It found that there was no conflict between the provisions of the Ohio election statute and the statute of descent, that the principle of law declared in **Miller v. Hammond** had direct application to the facts in the case before it; and held that the surviving widow was entitled to and must be allowed credit for the marital deduction established by Section 812 (e), Title 26, U. S. Code. (R., 29-40.)

It entered judgment reversing the Probate Court and ordered that, upon distribution, the widow should receive

her one-half share of the net probate estate free of the burden of the federal estate tax. (R., 25, 26.)

Upon appeal to the Supreme Court of Ohio that court stated that it was in agreement with the Court of Appeals as to the construction of the Ohio statutes. It then said, "* * * We are further of the opinion that the decision of this court in **Miller v. Hammond,** supra, fully supports the judgment which the Court of Appeals rendered in the instant case." (Appendix A, p. 27.)

Thereafter it overruled its decision in **Miller v. Hammond** and reversed the decision of the Court of Appeals.

Having found that the operative facts in **Campbell, Exr., v. Lloyd** and **Miller v. Hammond** were legally identical, in so far as the Ohio law was concerned, it is axiomatic that its overruling of its decision in **Miller v. Hammond** arises solely out of a different, and contrary, interpretation and construction of the federal estate tax law.

The application for rehearing filed after the decision of **Campbell, Exr., v. Lloyd** raises again the federal question of the proper construction of the provisions of the U. S. Revenue Act of 1948 as they pertain to the federal estate tax law. It also raised the second federal question stated herein. (R., 41-63.)

This application was denied without opinion. (R., 66.)

The question of the correct construction of Section 812 (e), Title 26, U. S. Code, is one of substance, and one not heretofore considered by this Court. The question of due process of law lies within the particular province of this Court.

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ARGUMENT.

QUESTION ONE.

I.

The United States Revenue Act of 1948 Equalizes the Federal Estate Tax Burdens of Married Couples in Common-Law and Community-Property States. It Provides for a Marital Deduction of up to Fifty Per Cent of the Property of a Decedent. This Property Passes to the Surviving Spouse Free of Federal Tax.

The Revenue Act of 1948 amended the Internal Revenue Code so as to provide that married persons might "split" their estates for purposes of federal taxation.

This Act effects a revolutionary change in the theory of federal estate taxation.

It puts residents of common-law and community-property states on an equal tax basis by recognizing that state law in the community-property jurisdictions effectively divides ownership of property between the spouses. Without requiring any change in property rights, the community-property concept is now made available to all married persons, irrespective of residence. Married couples in common-law states, of which Ohio is one, now enjoy the same tax advantages formerly available only to residents of community-property states.

The following portions of the report of the Senate Committee on Finance establish the intention of Congress in enacting this amendment, which also equalized the income tax burden. (Senate Report No. 1013, 80th Congress, Second Session (1948).):

> "B. The Estate and Gift Taxes.
>
> The basic differences between property rights

in community-property and non-community-property states have also resulted in geographic inequalities in the effect of the estate and gift taxes. In community-property states husbands and wives have an undivided one-half interest in the community property. Prior to 1942, upon the death of a spouse his one-half interest in the community property, over which he had the power of testamentary disposition, was subject to the estate tax. * * * On the other hand, in common-law states neither spouse had an undivided interest in the property of the other spouse. Since both estate and gift taxes have sharply progressive rates, with large specific exemptions, the consequence was a substantially lower tax on transfers in community-property states than on transfers of similar size in common-law states, where the usual case was that practically all the wealth of the married couple was the property of the husband.

In 1942 Congress attempted to provide more nearly equal results under the estate and gift taxes.

* * * * * * * * * *

Unfortunately, a number of problems have arisen under the 1942 amendments. (Page 26.)

* * * * * * * * * *

Your committee does not believe that a satisfactory solution to the problem of geographical equalization or the difficulties of tracing can be found under the 1942 amendments or amendments using a similar theoretical approach. Hence the repeal of these amendments is recommended, effective with respect to gifts made after the date of enactment of this bill and with respect to the estates of decedents dying after the date of such enactment. Your committee would be unwilling, however, merely to repeal the 1942 amendments. Repeal alone would reproduce the pre-1942 results which are even further from equalization than existing law.

With the repeal of the 1942 amendments your committee recommends estate and gift tax splitting which is similar in its effect to the splitting of the income tax provided for in this bill. (Page 27.)

* * * * * * * * * *

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Under the estate-tax provision of your committee's bill a decedent spouse is allowed a marital deduction from his gross estate in the amount of the value of all interests in property passing outright from the decedent to the surviving spouse by way of bequest, devise, transfer, right of survivorship in jointly held property, etc. The deduction is limited to an amount not in excess of 50 percent of the adjusted gross estate. (Page 27.)"

The plan of the Revenue Act of 1948 is to give a tax-free "marital deduction" for values passing to the surviving spouse. It grants to married couples in all states the right to consider their property as held by a divided ownership for federal estate tax purposes.

The Senate Report establishes beyond question that in adopting this technique of "estate splitting" Congress intended to establish a national uniformity in this field of taxation.

"Adoption of these portions of your committee's bill will establish a new national system for ascertaining federal estate and gift tax liabilities." (Senate Report No. 1013, 80th Congress, 2d Session (1948), page 29.)

II.

By Virtue of the Marital Deduction Provision of the Revenue Act of 1948 the Federal Estate Tax is Imposed Only Upon the Transfer of a Net Estate Which Excludes Property Values Passing to the Surviving Spouse.

The federal estate tax, as distinguished from a legacy or succession tax, is an excise upon the transmission of a statutory "net estate" by a decedent. It is not a property tax nor, as too often stated, a tax against the "estate of the decedent." It is a tax upon the surrender of old incidents

of property ownership by the decedent and the acquisition of new ones by the survivor.

Section 810, U. S. Internal Revenue Code, provides:

> "A tax equal to (percentages as given in table contained in the law) **shall be imposed upon the transfer of** the net estate of every decedent * * *" (Emphasis supplied.)

Section 812, U. S. Internal Revenue Code, provides the manner in which the "net estate" shall be determined. Subsection (e) of this section provides for the allowance of a "marital deduction," comprised of certain interests in property which pass from the decedent to the surviving spouse by virtue of a will or by inheritance from one who dies intestate. If the surviving spouse elects to take her share of the decedent's estate under the local law instead of taking an interest under the will, the interest she takes under the local law is by the definition in Section 812 (e) (3) considered as passing from the decedent to the surviving spouse.

This interest qualifies as the "marital deduction" and is excluded in determining the "taxable net estate" to which the federal estate tax rates are applied. There is, therefore, no federal tax upon the "transfer" of this property to the surviving spouse.

The act, however, limits the marital deduction to the "net value" of the property received by the surviving spouse. (Section 812 (e)(1)(E) U. S. Internal Revenue Code.)

Clause (ii) of subparagraph (E) directs that in determining the value of the interest passing from the decedent to the surviving spouse, incumbrances or obligations on such property shall be taken into account.

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Clause (i) of this sub-paragraph requires, as explained in the Senate Report, "* * * that there shall be taken into account the effect which the amount of any estate, succession, legacy or inheritance tax may have upon the net value of any interest in property passing to a surviving spouse. This provision is designed to prevent any implication that such taxes shall not be taken into account where such taxes and the marital deduction are mutually interdependent. * * * The rule applies whether the burden of a death tax falls upon the surviving spouse or the property in which an interest passes to the surviving spouse." (Senate Report No. 1013. (Part 2) 80th Congress, Second Session (1948).

If, for example, the surviving spouse must pay a state inheritance tax on her share the amount of this state tax reduces the net value of the marital deduction.

So also, although the intent of Congress was to exclude the share passing to the surviving spouse in determining the taxable net estate, and thus free it from tax, an erroneous interpretation of the federal law by a state court will have the effect of destroying the marital deduction as a tax-free share in the hands of the surviving spouse.

Thus, if a surviving spouse receives something less by reason of a state decision directing that she shall bear a portion of the federal estate tax, the marital deduction will be destroyed to the extent of the amount of such tax which she is required to pay out of her share.

This is contrary to the construction intended by Congress. The intent of Congress, and, consequently, the meaning of the law, is clear. The legislative intention was to restore to community property the same status for estate tax purposes which it had prior to the 1942 act, and to place the property of married persons in common-law states on an equal estate tax basis with the now reinstated "splitting"

principle of community property. The purpose of the amendment was to free the shares of **all** surviving spouses from the federal estate tax.

The amendment originated the marital deduction as an effective device for creating national uniformity as to federal estate taxation. To say, as did the court in **Campbell, Exr., v. Lloyd**, that Congress "disclaimed any intention that the marital deduction should not be burdened by the estate tax," is to read but one subparagraph of the law in such a manner as to distort and nullify the basic legislative intention.

The true function of this subsection is twofold. First, to deny a marital deduction except to the extent of the value of the property actually received by the surviving spouse; and secondly, to inter-relate the matter of the reduction of the burden of the tax with the question of who bears the burden of the tax. The result of this inter-relation is that the federal policy of equalization of the burden of the federal estate tax cannot be achieved so long as a state insists that the surviving spouse must pay a portion of that tax even though her share does not create or contribute to it.

III.

A Destruction of the Marital Deduction By a State Court Can Result Only from a Misconstruction of the Federal Law By Such Court.

The devolution and administration of estates is, of course, a matter of state law. The quantum of the share which the surviving spouse inherits from the deceased spouse, and the procedure for transferring such share, depend solely upon the provisions of a state's succession statute, and its

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laws relating to the administration of estates. The federal law does not control either the size or the transfer of such share.

Conversely, once the share has been determined, state law may not say whether the shifting of ownership of such share is or is not taxable by the federal government. This is wholly within the province of Congress.

While it has long been stated that the federal government is not concerned with the administration of estates, it is equally well settled that if a federal taxing statute is drawn into consideration in connection with such administration, a state court must give it that construction and effect which Congress intended.

The primary rule of construction of statutes is to ascertain and declare the legislative intention, and to carry such intention into effect to the fullest degree. A construction may not be adopted which would nullify, destroy, or defeat the intention of the legislature.

Upon analysis it will be readily observed that there cannot be an authentic conflict between the federal estate tax law and state laws pertaining to the devolution and administration of estates.

The state law determines the quantum of the share of the surviving spouse. The federal law then determines whether the federal government will or will not tax the transfer of such share. The state law, thereafter, provides the legal mechanism for the transfer of ownership from the deceased to the survivor.

When Congress has freed the transfer of a surviving spouse's share from its tax and, thereafter, a state court decision compels the surviving spouse or her property to bear part of the burden of this tax, it is axiomatic that the state court has misconstrued the federal law.

The error of the Ohio Supreme Court in the case at bar stems from its failure to ascertain, and then effectuate, the intention of Congress with regard to this amendment of the federal estate tax law. The incorrect conclusion which it reaches is predicated upon the false postulate that the federal tax is a tax on the decedent's entire estate. It has treated this tax, for administration purposes, as if it were a debt of the decedent.

The truth of the matter is that the federal estate tax is an excise tax on the transfer of only certain assets of the decedent. It is not a tax on all of the decedent's probate assets, including those which qualify as the marital deduction.

This conclusion is not changed by the fact that the federal government, exercising its implied power to designate the person responsible for payment of its tax, provides by Section 822 (h), U. S. Internal Revenue Code, that:

> "The tax imposed by this subchapter shall be paid by the executor to the collector."

This requirement for the collection and payment of the tax is procedural only and for the primary benefit and convenience of the federal government. Evidence of this lies in the fact that the term "executor" is defined by the Internal Revenue Code to mean the executor or administrator, or if there is none, then any person in actual or constructive possession of any property of the deceased. (U. S. Internal Revenue Code Section 930 (a).)

Although the federal estate tax is to be collected and paid by the personal representative of the deceased, the tax itself is not a tax on all assets in the personal representative's hands.

The initial thrust of the federal estate tax must obviously be against the property or person from whom the collector

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of internal revenue collects the tax. The ultimate or true thrust is determined by giving consideration to whether Congress intended that the transfer of the shares of all beneficiaries be taxed or whether that of the surviving spouse should be excluded.

This provision for collection of the tax does not convert the federal estate tax into a tax on the "decedent's estate" as that term is used with reference to the administration of estates, nor is it a "debt of the deceased," for the reason that it was not incurred during his lifetime but originated concurrently with his death.

The federal estate tax is only what Congress has declared it to be—a tax on the transfer of those assets which Congress has said shall be included in the net estate against which the tax rates shall be applied. This excludes the surviving spouse's share if it qualifies as the "marital deduction."

The U. S. Revenue Act of 1948 represents a singular departure from the provisions of earlier federal estate tax laws.

Under prior laws the shares of all beneficiaries created and contributed to the federal estate tax. There was no differentiation based on the relationship of a beneficiary.

Since the 1948 amendment, however, the liability for the tax based on the portion of the property of a deceased spouse which by inheritance or otherwise passes to the surviving spouse, is postponed; thus, there being recognized for tax purposes a joint ownership in the property of the deceased.

In **Riggs v. Del Drago**, 317 U. S., 95 (1924), this Court upheld the right of a state to enact a law apportioning the burden of the federal estate tax where a testator had neglected to specify the beneficiary or beneficiaries who should bear the thrust of the tax. In the course of its

opinion, "* * * based upon the provisions of the Revenue Act of 1916, and subsequent acts, their legislative history and their administrative interpretation * * *," it said:

> "The intent of Congress was that the federal estate tax should be paid out of the estate as a whole, and that the distribution of the remaining estate and the ultimate impact of the federal tax should be determined under the state law."

This language does not, quite obviously, now serve as authority for state courts to determine the trust of the federal estate tax in such a manner as they may choose, should their choice have the effect of nullifying the intention of Congress in enacting the United States Revenue Act of 1948.

Congress, since the decision of the **Del Drago** case, has determined that the transfer of the share of the surviving spouse shall not be subject to its estate tax. State courts must, therefore, so construe all provisions of the federal estate tax law as to carry this intention into effect to the fullest degree.

The Supreme Court of Ohio, in **Campbell, Exr., v. Lloyd**, confusing the respective functions of federal and state law, misconstrued the federal statute and deprived the widow of the right accorded her by Congress to receive the transfer of her share free from the federal estate tax.

IV.

Lacking a Definitive Decision by This Court, the State Courts Are Recreating the Geographical Inequality Which Congress Sought to Eliminate.

The decisions of the Ohio Supreme Court in **Miller v. Hammond** and **Campbell, Exr., v. Lloyd** dramatically depict the confusion which has arisen with reference to the interpretation and application of the provisions of the 1948 amendment.

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The decisions in these two cases may not be distinguished upon the facts nor are the opposing conclusions the result of changed law, either federal or state. They result solely from contradictory interpretations of the U. S. Revenue Act of 1948.

In the consideration and decision of each case the Ohio Supreme Court gave pointed recognition to the predominant importance of the change made in the federal law by the 1948 amendment. Yet the same court could not, for a period of less than three years, agree upon the interpretation and construction of this new provision.

In **Miller v. Hammond** the court said:

> "The question now presented has not been heretofore considered by this court. It arises by reason of the enactment of Section 812 (e), Title 26, U. S. Code, effective in 1948, by which Congress created the so-called 'marital deduction' under which bequests and certain other transfers to a surviving spouse qualify as deductions from the gross estate of a decedent in the computation of the federal estate tax." (Appendix B, p. 39.)

In the opening paragraph of its opinion in **Campbell, Exr., v. Lloyd** the court said:

> "As it did in **Miller et al., Exrs., v. Hammond,** 156 Ohio St., 475, 104 N. E. (2d), 9, the question to be determined in the instant case arose because of the enactment of Section 812 (e), Title 26, U. S. Code, effective in 1948, by which Congress created the so-called 'marital deduction' under which bequests and certain transfers to a surviving spouse qualify as deductions from the gross estate of a decedent in the computation of the federal estate tax." (Appendix A, p. 26.)

The judicial contrariety as to result in these two cases is not restricted to Ohio. The highest courts of other states have met this problem, and, depending upon whether they

have correctly or incorrectly interpreted the federal statute, have either fulfilled or thwarted the intent of Congress.

The following cases are typical of decisions which have been rendered since 1948.

The first case to be decided after the enactment of the "marital deduction" amendment, and to deal specifically with this question, was the case of **In re Peters' Will**, 88 N. Y. Supp. (2d), 142, 1942 (March 22, 1949). Affirmed, Supreme Court, Appellate Division, Second Department, on June 13, 1949. 89 N.Y. Supp. (2d), 651.

The question raised in the **Peters** case turned on precisely the same point as the question in the Ohio cases; namely, what is the effect of the new legal concept of a "marital deduction," provided by the Revenue Act of 1948; and what is the right of the surviving spouse to take the property qualifying for the marital deduction without its being diminished by any portion of the federal estate tax levied upon the net taxable estate of the deceased?

In holding that the widow, who had elected to take under the law rather than the will, took her share free of federal estate tax, the court said:

> "* * * Sec. 812 (e), which has introduced a new legal concept referred to as a 'marital deduction' cannot be overlooked in this connection. Its purpose is to allow a surviving spouse to take a certain portion of the estate free of federal estate taxes. * * *"

The highest court in Kentucky followed the reasoning of this case and gave the widow her share free from the federal tax. **Lincoln Bank & Trust Co. v. Huber** (1951), 240 S. W. (2d), 89.

The same conclusion was reached in **Miller v. Hammond**.

On the other hand the highest courts of North Carolina and Wisconsin, ignoring the intention of Congress in enacting the 1948 amendment, and misconstruing the federal

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estate tax as a tax upon the entire estate, held that the widow must bear a proportionate share of the taxes in spite of the provision for a marital deduction in Section 812 (e), Title 26, U. S. Code. To the same effect is the case at bar.

The national uniformity sought by Congress with respect to the burden of federal estate taxes has been and is being frustrated with each new decision.

The decisions in these cases and many others are reproducing results which are even further from equalization than the pre-1942 results which Congress endeavored to eliminate.

The administration of estates and the determination of federal estate taxes are not matters of occasional occurrence. Not only are many surviving spouses not receiving the true value of their shares tax free, as Congress intended, but the effect of such decisions as that in **Campbell, Exr., v. Lloyd** is to require the payment of federal taxes in excess of what the government requires when its law is correctly construed. For example, in the case at bar not only is the widow's true share reduced by $171,000 by virtue of her having to pay a portion of a tax which her share does not create or contribute to but the tax payable to the federal government is approximately $58,000 more than it would have been had the decision in **Miller v. Hammond** been followed.

The need for a decision construing the United States Revenue Act of 1948 is of paramount importance if Congress's stated objective of bringing about national uniformity in determining federal estate tax liabilities is to be realized.

QUESTION TWO.

I.

The Retroactive Application of the Ohio Supreme Court's Overruling Decision Denies the Widow of Her Property Without Due Process of Law, in Contravention of the Fourteenth Amendment of the Constitution of the United States.

Judicial determinations of substantive rights may now, like legislative enactments affecting substantive matters, violate the Due Process and other clauses of the federal Constitution.

In the constitutional protection of substantive rights of property and person, no distinction is today drawn as between governmental action by courts and governmental action by legislatures. It is the character, not the source, of the governmental thrust against private interests which controls on the issue of constitutionality. **Cantwell v. Connecticut**, 310 U. S., 296 (1940); **American Federation of Labor v. Swing**, 312 U. S., 321 (1941). Thus, in the latter case, application of a judicially developed doctrine of equitable intervention in labor disputes was held by this court to be as violative of the Due Process Clause of the Fourteenth Amendment as would have been an Illinois statute to the same effect.

The earlier cases of **Central Land Co. v. Laidley**, 159 U. S., 103 (1895), and **Tidal Oil Co. v. Flanagan**, 263 U. S., 444 (1924), are therefore distinguishable from the case at bar not alone on their facts but basically because they were decided at a time when only judicial action affecting **procedural** rights was held violative of the Due Process Clause of Amendment Fourteen. Note: (1928) 28 Columbia L.

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Rev., 619, Stimson, **Retroactive Application of Law—A Problem in Constitutional Law**; (1939) 39 Mich. L. Rev., 30.

For purposes of determining the federal constitutional question presented by this case, the decision of the Supreme Court of Ohio in **Campbell, Exr., v. Lloyd**, overruling **Miller v. Hammond**, must be treated exactly as though the General Assembly of the state of Ohio had under identical circumstances enacted a statute of precisely the same operative effect.

The governmental action here challenged was in its very essence retroactive—after the fact. Although the Ex Post Facto Clauses of the federal Constitution have by long interpretation been limited to criminal laws, they express a profound opposition to acts of government which the citizen is helpless to forecast no matter how careful he may be. Similar opposition to civil acts of government having the same vice is imbedded in the Contract Clause of Article I, Section 10, and in the conception of Due Process. **Wood v. Lovett**, 313 U. S., 362 (1941); **Thompson v. Consolidated Gas Utilities Corp.**, 300 U. S., 55 (1937).

Here there is no question but that, when she elected to take against the will, the widow in good faith and in all reasonableness expressly relied upon the established and accepted law of Ohio as then enunciated by **Miller v. Hammond**. See the affidavit set forth as Exhibit A, petition for rehearing; Supreme Court of Ohio. (R., 62.)

Decisions of this court have long made it clear that **demonstrated reliance** is the key to vestedness. **Coombes v. Getz**, 285 U. S., 434 (1932); **Wood v. Lovett**, supra; **Louisville Joint Stock Land Bank v. Radford**, 295 U. S., 555 (1935). And the property right thus vested by this affirmative act of reliance upon **Miller v. Hammond's** interpretation of applicable federal and state law was a substantial

one worthy of constitutional protection. It is to be clearly distinguished from the destructible "right to inherit" which does not receive constitutional protection. **Ostrander v. Preece**, 129 Ohio St., 625, 196 N. E., 670, appeal dism., 296 U. S., 543 (1935). It is of far more substantiality than the right of a debtor faced with a retroactive extension of the statute of limitations, partially protected by **Campbell v. Holt**, 115 U. S., 620 (1885), **reaffirmed, Chase Securities Corp. v. Donaldson**, 325 U. S., 304 (1945).

The widow's rights are vested property rights. Even though the executor had control of the property of the deceased for the purpose of paying debts of the deceased, funeral expenses, and costs of administration, her right to one-half of her deceased husband's property, to be reduced by these charges, vested in her at the time of his death. She inherits from her deceased husband, not from his executor.

These vested property rights have been substantially expropriated. Under **Miller v. Hammond**, upon which she properly and inevitably relied, the widow, by electing to take against the will, was entitled to one-half of the net estate free from the burden of any portion of the federal estate tax. By the retroactive overruling decision of **Campbell, Exr., v. Lloyd**, she is forced to bear one-half of that tax. In terms of dollars, she stands to lose $171,000 in a claim to one-half of an estate of something over two million dollars. Clearly, this is emphatically not a situation where governmental expropriations were found constitutionally valid because the taking was only of a futuristic and speculative amount, **United States v. Powelson**, 319 U. S., 266 (1943), or illusory, **Gelfert v. National City Bank**, 313 U. S., 221 (1941), or of an economically non-existent value, **Market Street Ry. Co. v. California Railroad Comm.**,

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324 U. S., 548 (1945); or insubstantial, **Abie State Bank v. Bryan**, 282 U. S., 765 (1931); **North American Co. v. Securities Exchange Comm.**, 327 U. S., 686 (1946).

Here the taking is substantial, whether measured relatively or absolutely. The expropriation cuts to the essence of the property right, as in **Louisville Joint Stock Land Bank v. Radford**, supra, and **Wood v. Lovett**, supra, and is unconstitutional in the same way as those takings were by this court held violative of Due Process or the equivalent constitutional provision of the Contract Clause.

The widow has done nothing to justify this substantial expropriation of her vested property rights nor is there in the facts of the case at bar an overriding public interest to justify such expropriation.

Existence of a real and **bona fide** public interest underlying governmental action which involves property expropriation will weigh strongly in favor of the constitutionality of such action. Evidence that the entire society has a stake in the action taken by government changes the constitutional complexion of what otherwise appears only as a taking of property from **A** for the benefit of **B**. Demonstration of such an overriding public interest was in large measure the cause of the decisions favoring constitutionality in, for example, **Miller v. Schoene**, 276 U. S., 272 (1928); **West Coast Hotel Co. v. Parrish**, 300 U. S., 379 (1937), **Battaglia v. General Motors Corp.**, 169 F. (2d), 254 (C. A. 2d, 1948), cert. denied, 335 U. S., 887 (1948). Per contra, the absence of any such public justification will ground a holding of unconstitutionality. **Pennsylvania Coal Co. v. Mahon**, 260 U. S., 393 (1922); **Wood v. Lovett**, supra.

The public has no beneficial interest in the retroactive application of the overruling decision in **Campbell v. Lloyd.**

Indeed, strong public interest lies in the opposite direction. To affirm the rule of **Miller v. Hammond** is to recognize and effectuate congressional intention to equalize the federal estate tax burdens of married couples. To overrule that decision, as the court did in **Campbell, Exr., v. Lloyd** is to reject and nullify such congressional intent. Such action by the court transcends the mere rights of the widow in this case, substantial as they are.

CONCLUSION.

The decision of the Supreme Court of Ohio in **Campbell, Exr., v. Lloyd,** misconstrues Section 812 (e), Title 26, U. S. Code, and deprives the petitioner of her right to receive her share of her deceased husband's estate free of the federal estate tax.

The decision of that court in this case, by its retroactive application to the vested property rights of the petitioner, deprives her of her property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

The judgment of the Supreme Court of Ohio should be reversed and final judgment should be ordered in accordance with the judgment of the Court of Appeals for Cuyahoga county, Ohio, and in conformity with the decision and judgment of the Supreme Court of Ohio in **Miller v. Hammond.**

Respectfully submitted,

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APPENDIX A.

Campbell, Exr., Appellee, v. Lloyd et al., Appellees; Lloyd, a Minor, Appellant.

Taxation—Federal estate tax—Deducted from decedent's estate before computing widow's share—surviving spouse electing not to take under will.

Where a widow elects under Section 10504-55, General Code, to take under the statute of descent and distribution and the applicable portions of that statute (Section 10503-4, General Code) provide that "personal property shall be distributed" and any "real estate or inheritance shall descend and pass in parcenary" in part to the surviving spouse, the amount of the federal estate tax on the decedent's estate should be deducted therefrom before computing the widow's share thereof. (Sections 10503-4, 10504-55, 10504-77, 10509-121, 10509-181, 10509-182 and 10510-2, General Code, and Section 812 (e), Title 26, U. S. Code, construed and applied. The syllabus in Tax Commission, ex rel. Price, Atty. Genl., v. Lamprecht, Admr., 107 Ohio St., 535, approved and followed. Paragraphs two, three and four of the syllabus and the decision in Miller et al., Exrs., v. Hammond, 156 Ohio St., 475, overruled. McDougall, Admr., v. Central National Bank of Cleveland, Trustee, 157 Ohio St., 45, distinguished.)

(No. 33911—Decided November 17, 1954.)

Appeal from the Court of Appeals for Cuyahoga county.

Charles E. Roseman, Jr., herein referred to as decedent, died on March 26, 1952, leaving a will which was admitted to probate. Decedent was survived by a widow and by an infant daughter who is his only lineal descendent.

Under the terms of item II of decedent's will, his widow was given "one-half of" his "net estate * * * to be hers

absolutely and in fee simple." The will gave the remainder of the estate, after certain specific bequests, to a trustee for the benefit of decedent's child with the proviso that, if the child should not live to receive all the benefits provided for her, what was left should be distributed to certain charitable organizations.

Pursuant to Section 10504-55, General Code, decedent's widow duly elected to take under the statute of descent and distribution.

Decedent's gross estate had a value of approximately $2,275,326.36. Its amount is such as to involve a substantial federal estate tax.

Plaintiff, as the duly qualified executor of decedent's estate, instituted an action in the Probate Court of Cuyahoga county for a declaratory judgment to determine whether the amount of the federal estate tax should or should not be deducted from the estate before computing the widow's one-half share of the estate.

The Probate Court rendered a judgment holding that it should be deducted.

On appeal to the Court of Appeals, that judgment was reversed and the Court of Appeals held that the amount of the federal estate tax should not be deducted from the estate before computing the widow's one-half share of the estate.

The cause is now before this court on appeal from the judgment of the Court of Appeals, pursuant to allowance of a motion to certify the record.

Taft, J. As it did in Miller et al., Exrs., v. Hammond, 156 Ohio St., 475, 104 N. E. (2d), 9, the question to be determined in the instant case arose because of the enactment of Section 812 (e), Title 26, U. S. Code, effective in 1948, by which Congress created the so-called "marital deduction" under which bequests and certain transfers to a sur-

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viving spouse qualify as deductions from the gross estate of a decedent in the computation of the federal estate tax.

Decedent's widow contends that the decision of this court in Miller v. Hammond, supra, requires affirmance of the judgment of the Court of Appeals. On the other hand, the guardian ad litem of decedent's daughter, who will be herein referred to as the guardian, contends that, because of certain provisions of Section 10504-55, General Code, pursuant to which the widow made her election, the decision of this court in Miller v. Hammond, supra, does not apply.

Section 10504-55, General Code, reads so far as pertinent:

"After the probate of the will and filing of the inventory, appraisement and schedule of debts, the Probate Court on the motion of the executor or administrator, or on its own motion, forthwith shall issue a citation to the surviving spouse, if any, to elect whether to take under the will or under the statute of descent and distribution. In the event of election to take under the statute of descent and distribution, *such spouse shall take not to exceed one-half of the net estate.* * * *" (Emphasis added)

The guardian contends that "the net estate" is what remains of the estate after all debts and obligations of decedent and of the estate, including the federal estate tax, have been paid; and that the widow's election can entitle her to no more than one-half of that.

We are in agreement with the Court of Appeals that the words "net estate," as used in Section 10504-55, General Code, describe the same property as do those words of Section 10503-4, General Code, which describe the property to be distributed and to descend and pass pursuant to the provisions of the latter statute. We are further of the opinion that the decision of this court in Miller v. Hammond, supra,

fully supports the judgment which the Court of Appeals rendered in the instant case.

Such a decision, however, results in the widow receiving as her "one-half of the net estate," somewhere between $286,000 and $296,000 (or between 37 per cent and 42 per cent) and more than all the others entitled to share in the estate. In view of this result, we are inevitably though reluctantly led to a reconsideration of our decision in Miller v. Hammond, supra.

At the outset, it may be noted that, in enacting the subsection of the statute providing for the marital deduction (Section 812 (e), Title 26, U. S. Code), Congress disclaimed any intention that the marital deduction should not be burdened by the estate tax. Thus, in paragraph (1) of that subsection, in defining the marital deduction, it is stated:

"(E) Valuation of interest passing to surviving spouse. In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

"(i) There should be taken into account the effect which a tax imposed by this chapter * * * has upon the net value to the surviving spouse of such interest * * *."

The words "a tax imposed by this chapter" refer to the tax imposed by the chapter providing for the federal estate tax.

It is arguable that, in the absence of statutory provisions which would be inconsistent with such a result, this court should require an equitable apportionment of the estate tax which would relieve this widow's share of her husband's estate from part or all of the burden of the federal estate tax on his estate. The question remains whether the

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statutes, which provide for the rights which she claims in his estate, would be consistent with such a result.

The rights of the widow are admittedly dependent upon the provision of Section 10504-55, General Code, that she may "elect whether to take under the will or under the statute of descent and distribution" and on the provisions of the statute of descent and distribution. The applicable portion of the latter statute is Section 10503-4, General Code, which provides so far as pertinent:

"When a person dies intestate having title or right to any personal property, or to any real estate or inheritance in this state, such *personal property* shall be *distributed, and* such *real estate* or inheritance shall *descend and pass* in parcenary, except as otherwise provided by law, in the following course:

"* * *

"2. If there be a spouse and one child, or its lineal descendants, surviving, *one-half to* the *surviving spouse* and one-half to such child or its lineal descendants, per stirpes.

"3. If there be a spouse and more than one child, or their lineal descendants, surviving, one-third to the surviving spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes.

"4. If there be no children, or their lineal descendants, three-fourth to the surviving spouse and one-fourth to the parents of the intestate equally, or to the surviving parent; if there be no parents, then the whole to the surviving spouse." (Emphasis added)

As to personal property, the statutes of this state require an executor or an administrator to pay the debts or make provision for their payment before distribution of such personal property can be made. See Sections 10509-121, 10509-181 and 10509-182, General Code. As stated in the

syllabus in Tax Commission, ex rel. Price, Atty. Genl., v. Lamprecht, Admr., 107 Ohio St., 535, 140 N. E., 333, 31 A. L. R., 985, "in determining the value of the succession of any * * * beneficiary the *amount of* the *federal estate tax should* first *be deducted, like other debts* and expenses of administration." See also Y. M. C. A. v. Davis, 106 Ohio St., 366, 140 N. E., 114, and Davidson v. Miners & Mechanics Savings & Trust Co., Exr., 129 Ohio St., 418, 430, 195 N. E., 845, 98 A. L. R., 1318.

Under the words of Section 10503-4, General Code applicable in the instant case, the widow will be entitled to none of the personal property of her husband until it is to *"be distributed."* At that time, its amount will necessarily be diminished by the payment "like other debts" or provision for such payment of the federal tax on his estate. Thus, the statute gives her only one-half of that diminished amount. If therefore the personal property of the estate is sufficient to pay all charges against the estate, it would obviously be inconsistent with that statute to give her more than one-half of that diminished amount of personal property.

As in Miller v. Hammond, supra, it does not appear from the record in the instant case that the personal property available was insufficient to pay all charges against the estate. However, it may be observed that even though, under the words of Section 10503-4, General Code, "any real estate" of decedent did "descend and pass in parcenary" one-half to his widow, such real estate would be fully available to the executor to pay charges against the estate, if the personal property were insufficient. See for example Sections 10510-2 and 10504-77, General Code, and paragraph two of the syllabus of Barlow v. Winters Natl. Bank & Trust Co., 145 Ohio St., 270, 61 N. E. (2d), 603, 160 A. L. R., 423. Cf. Section 10504-74, General Code.

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The widow further contends that "the concept of equitable apportionment * * * established" in Miller v. Hammond, supra was "restated and applied" in McDougall, Admr., v. Central National Bank of Cleveland, Trustee, 157 Ohio St., 45, 104 N. E. (2d), 441. That case dealt with apportionment of the estate tax between assets which were a part of the decedent's estate under the law of this state (referred to therein as "probate assets") and assets which were not but which were taxed by the federal government as though they were (referred to therein as "nonprobate assets"). There was no statute which was inconsistent with an equitable apportionment of the federal estate tax burden between the probate and the nonprobate assets. See paragraph one of the syllabus and the opinion at pages 51, 52 and 55. Although the opinion does state that Miller v. Hammond, supra, would require the result there reached (pages 50 and 51), the reasons thereafter given in the opinion and the principles of law stated in the syllabus are sufficient to sustain that decision without reference to Miller v. Hammond, supra.

Because we are of the opinion that they are inconsistent with the provisions of the statutes hereinbefore referred to, paragraphs two, three and four of the syllabus and the decision in Miller v. Hammond, supra, must be overruled. Because we are of the opinion that those statutory provisions require such a result, the judgment of the Court of Appeals is reversed and that of the Probate Court is affirmed.

Judgment reversed.

Weygandt, C. J., Hart, Zimmerman and Lamneck, JJ., concur.

Weygandt, C. J., concurs for the additional reason that, as observed by the appellant, the decision in the Miller case is distinguishable on the facts.

Middleton and Stewart, JJ., dissent.

Stewart, J., dissenting. In the case of Riggs, Gdn., v. Del Drago, 317 U. S., 95, 98, 87 L. Ed., 106, 63 S. Ct., 109, the Supreme Court of the United States held that Congress had not undertaken to determine the thrust of the federal estate tax, and that that thrust should be borne as the state law provides.

By Section 812 (e), Title 26, U. S. Code, Congress undertook to place property of married persons residing in common-law states upon an equal basis with property of married persons residing in community-property states, so far as the federal estate tax is concerned. Where a married resident dies in a community-property state, the surviving spouse is considered to own one-half of the entire community estate in the name of the deceased spouse, which one-half is not subject to the estate tax. In a common-law state, where a surviving spouse is entitled under the statute of descent and distribution to a portion of the deceased spouse's estate, up to one-half of the estate is not, under the doctrine of equitable apportionment, subject to the federal estate tax, and, therefore, should not bear the thrust of that tax which is levied against the decedent's estate.

The other states of the Union are divided with reference to whether the surviving spouse's estate should bear any of the thrust of the tax.

On January 30, 1952, this court, in the case of Miller et al., Exrs., v. Hammond, 156 Ohio St., 475, 104 N. E. (2d), 9, adopted as the law of Ohio the theory of equitable apportionment and relieved a surviving spouse's share in the deceased spouse's estate from the thrust of the federal estate tax. That has been the rule in this state since that time and doubtless a large number of estates have been administered under that rule. Now, with nothing having happened in the meantime to change the atmosphere or

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the situation with reference to the settlement of estates, we overrule Miller v. Hammond, supra, and adopt a contrary rule, taking away from surviving spouses the advantage of the rule of equitable apportionment and giving the resulting advantage to other beneficiaries of the estate. If this were a new question in Ohio, there would be much to be said in favor of either of the rules. The rule which we adopt today might well have been originally adopted.

I am in thorough accord with the idea that it is highly proper for this court to overrule one of its former decisions, where conditions have changed, making the former decision inapplicable to the present times, or where the former decision is manifestly or clearly wrong, but it seems to me that, under the doctrine of stare decisis, where this court has laid down a rule of property, where nothing has intervened to change the conditions under which it was laid down and where the principle enunciated is overruled within a little over two years, there results an uncertainty of reliance upon our decisions. Surely the surviving spouse whose rights were settled since January 30, 1952, must rejoice that such rights are not being settled now, whereas, from now on, the other beneficiaries of a deceased spouse whose rights have been determined within the last two years must wonder why they fare so much worse than those in a similar situation to their own will fare in the future.

Middleton, J., concurs in the foregoing dissenting opinion.

Judgment of the Supreme Court of Ohio in Campbell, Exr., v. Lloyd.

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Cuyahoga county, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of

the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Probate Court of Cuyahoga county be, and the same hereby is, affirmed.

It is further ordered and adjudged that appellant recover from appellees her costs expended in this court and in the Court of Appeals taxed at $.

Ordered, that a special mandate be sent to the Probate Court of Cuyahoga county, to carry this judgment into execution.

Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals of Cuyahoga county, "for entry."

APPENDIX B.

Miller et al., Appellees, v. Hammond, Appellant, et al., Appellees.

Taxation—Federal estate tax—Determination of, made, how—Title 26, Section 812, U. S. Code—Allowance for "marital deduction"—Ultimate burden of tax—Surviving spouse electing not to take under will—Marital deduction not reduced by deduction of tax—Deduction of portion of tax from surviving spouse's share, erroneous, when.

1. Section 812 (e), Title 26, U. S. Code, effective in 1948, a part of the Internal Revenue Act, providing for the allowance of a "marital deduction," to the extent therein authorized, for the amount of certain interests in property included in a decedent's gross estate which pass, or have passed, from the decedent to the surviving souse, author-

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izes the determination of the federal estate tax in accordance with the distribution of the decedent's estate.

2. Sections 10509-181 and 10509-182, General Code, requiring executors and administrators to pay or otherwise secure debts before the distribution of the estates of decedents, and Section 10509-121, General Code, prescribing the order in which the debts of the deceased are to be paid, do not fix the ultimate burden of federal estate taxes upon the estates passed by will or under the law of descent and distribution.

3. In the distribution of the portion of a testator's estate, which passes to the surviving spouse under the statute of descent and distribution after election not to take under the will, such surviving spouse is entitled to, and must be allowed, credit for the marital deduction established by Section 812 (e), Title 26, U. S. Code, and such portion may not be reduced by the deduction therefrom of federal estate taxes which do not directly result from the passing of the estate to the surviving spouse.

4. Where a surviving spouse elects to take his or her intestate share, consisting of one-third of the decedent's estate, in lieu of a bequeathed life estate, and the executors determine such share to be one-third of the decedent's net estate, after payment of all federal estate taxes assessed against the entire estate of said testator (the full marital deduction having been made by the executors) with a resulting reduction of the intestate share of the spouse in an amount equal to one-third of all the federal estate taxes on decedent's estate, such determination deprives the spouse

of the benefit of the marital deduction authorized by Section 812 (e), Title 26, U. S. Code, and is erroneous.

(No. 32652—Decided January 30, 1952.)

Appeal from the Court of Appeals for Franklin county.

This cause originated in the Probate Court of Franklin county as an action for a declaratory judgment. The action was brought by the plaintiffs as executors of the estate of Frederick A. Miller, deceased. They prayed "that the court shall determine and declare whether defendant Roberta M. Hammond as widow of said Frederick A. Miller, deceased, having elected to take under the statute of descent and distribution, is entitled to receive, upon distribution of said estate, one-third of the assets thereof after the payment of all debts, taxes, funeral and administration expenses, or whether said defendant is entitled to receive upon distribution of said estate one-third of the assets of said estate after the payment only of debts, funeral and administration expenses and taxes other than federal estate taxes assessed against the transmission of said estate, and that the court give such further judgment and direction to the plaintiffs as will declare the rights of all defendants herein as parties in interest in said estate and enter such judgment and decree as will direct the plaintiffs in the administration of said estate and protect them from liability for such act or acts as they may be directed to do or abstain from doing; and for all other, different and proper relief to which plaintiffs may be entitled either in law or in equity."

The testator, Frederick A. Miller, died on May 6, 1948, a resident of Franklin county, Ohio, leaving Roberta M. Miller, his widow, and two children, Edward W. Miller and Frances Ann Miller Brandon, surviving. The widow, Roberta M. Miller, has since married Hammond. The will was admitted to probate by the Probate Court of Franklin

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county on May 13, 1948, on which date letters testamentary were issued to Roberta M. Miller, Edward W. Miller and The City National Bank & Trust Company, Columbus, Ohio, as executors. The third item of the will provided life estates for the widow and each of the two children. The net value of the estate is over $2,000,000. The widow elected to take under the statute of descent and distribution.

Following the hearing and consideration of the issue presented the Probate Court announced the following decision: "* * * that in computing the federal estate tax the marital deduction, provided by Sec. 812 (e) of the United States Internal Revenue Code shall be deducted from the gross estate in the same manner as other applicable deductions authorized by Section 812 of said Internal Revenue Code; that the widow must bear her proportionate share of the burden of the whole of said federal estate tax; and that after the payment of said federal estate tax, debts of the decedent, funeral expenses, administration expenses and other taxes provided by law, the widow shall receive one-third of the remaining assets of said estate."

The court rendered judgment accordingly and directed the executors "to pay out of the assets of the estate all debts of the decedent, funeral expenses, administration expenses, and taxes, including the whole of the federal estate tax, and to, thereafter, distribute one-third of the net balance of the estate remaining to the widow, Roberta M. Miller Hammond."

Upon appeal to the Court of Appeals the judgment of the Probate Court was affirmed.

The cause is in this court following the allowance of a motion to certify the record.

Matthias, J. It should be noted at the outset that although the tax involved in this case is the federal estate

tax (Sections 800 to 928, inclusive, Title 26, U. S. Code) the construction of the statutes of this state relating to the descent and distribution of the estate of a decedent is the question primarily presented. (Section 10503-4 et seq., General Code.)

A pertinent statement of Mr. Justice Murphy in the case of Riggs, Gdn., v. Del Drago, 317 U. S., 95, 98, 87 L. Ed., 106, 63 S. Ct., 109, is as follows:

"In the Act of 1916 Congress turned from the previous century's inheritance tax upon the receipt of property by survivors (See Knowlton v. Moore, 178 U. S., 41; Scholey v. Rew, 23 Wall., 331) to an estate tax upon the transmission of a statutory 'net estate' by a decedent. That act directed payment by the executor in the first instance, section 207, but provided also for payment in the event that he failed to pay, section 208. It did not undertake in any manner to specify who was to bear the burden of the tax. Its legislative history indicates clearly that Congress did not contemplate that the Government would be interested in the distribution of the estate after the tax was paid, and that Congrss intended that state law should determine the ultimate thrust of the tax. That Congress, from 1916 onward, has understood local law as governing the distribution of the estate after payment of the tax (with the limited exceptions created by Section 826 [c] and [d] of the Internal Revenue Code, to be discussed presently) is confirmed by Section 812 (d) of the Code, dealing with charitable deductions, which recognizes that estate taxes may be payable in whole or in part out of certain bequests, etc., 'by the law of the jurisdiction under which the estate is administered.' The administrative interpretation has been in accord, and that has been the understanding of the federal courts, and of some state courts."

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The question now presented has not been heretofore considered by this court. It arises by reason of the enactment of Section 812 (e), Title 26, U. S. Code, effective in 1948, by which Congress created the so-called "marital deduction" under which bequests and certain other transfers to a surviving spouse qualify as deductions from the gross estate of a decedent in the computation of the federal estate tax. Section 812 is quite lengthy but it may be summarized and its pertinent provisions stated as follows:

"For the purpose of the tax the value of the net estate shall be determined * * * by deducting from the value of the gross estate—

"(a) Exemption. An exemption of $100,000;

"(b) Expenses, losses, indebtedness, and taxes.

"Such amounts—

"(1) for funeral expenses,

"(2) for administration expenses,

"(3) for claims against the estate,

"(4) for unpaid mortgages * * *, and

"(5) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction * * *.

"* * *

"(c) Property previously taxed. * * *

"* * *

"(d) Transfer for public, charitable, and religious uses. * * *

"(e) Bequests, etc., to surviving spouse

"(1) Allowance of marital deduction.

"(A) In general. An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse * * *.

"* * *

"(3) Definition. For the purposes of this subsection an interest in property shall be considered as passing from the decedent to any person if and only if—

"* * *

"(C) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent * * *."

The nature of the "marital deduction" is discussed in Montgomery's Federal Taxes, Estates, Trusts and Gifts (1950-1951), 763, in part as follows:

"The Revenue Act of 1948 made drastic changes in the theory of the taxation of estates. One fundamental change is in the deductions allowable in computing the net estate subject to tax, effected through the addition to the Code of subsection 812 (e), which provides for the allowance of a marital deduction, to the extent authorized therein, for the amount of certain interests in property included in the decedent's gross estate which pass, or have passed, from the decedent to the surviving spouse. * * *

"Prior to the enactment of the Revenue Act of 1942, community property enjoyed a supposed estate tax advantage. Upon the death of either spouse, only one-half of the community property was includible in the gross estate. The 1942 Act amended the Code [sections 811 (b) (5), 811 (e) (2), 811 (g) (4)] to provide in substance that upon the death of a spouse, the entire community property was to be included in the gross estate of the decedent, less only such part as might be shown to have been received as compensation for personal services rendered by the surviving spouse or from the separate property of the surviving spouse, provided, however, that the amount included might not be less than the part subject to the decedent's power of testamentary disposition. Thus, if the entire community

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property were attributable to the husband, the entire amount would be includible in his gross estate if he should die first, whereas, if the wife were the first to die, then the one-half over which she had a power of testamentary disposition would be includible in her gross estate. These provisions of the 1942 Act undoubtedly removed whatever estate tax advantage community property may theretofore have enjoyed, and in requiring that there be included in the husband's estate property in which his wife had acquired an interest during his lifetime and over which she had no power of testamentary disposition and which would be included in the wife's estate if she died first, it is at least arguable that the act swung the pendulum to the other side and placed community property at an estate tax disadvantage.

"The Revenue Act of 1948, by repealing sections 811 (b) (5), 811 (e) (2) and 811 (g) (4) of the Internal Revenue Code, has restored to community property the same status for estate tax purposes which it had prior to the 1942 Act. * * *

"To place the property of married persons in common-law states on a more nearly equal estate tax basis with the now reinstated 'splitting' principle of community property, the 1948 Act also amended the law to permit a married person holding separate property to achieve substantially the same 'splitting' advantage, provided that he also accepted some of the community property disadvantages. This has been accomplished by the addition to the Code by section 361 of the 1948 Act of a new subsection 812 (e) providing for the allowance of a 'marital deduction' in computing the net estate subject to tax.

"The amendments to the estate tax law appear to achieve at least substantial equality between community property

and separate property so far as the federal estate tax is concerned. * * *

"The marital deduction is not limited in its application to residents of common-law states; it also applies to the separate but not the community property of residents of community property states. * * *

"Prior to the 1948 Act, the estate tax had been determined with reference only to the decedent's interest in the property comprising his estate and it was generally unnecessary to determine the tax with reference to the decedent's disposition of the property, except in the case of charitable bequests. Under the 1948 Act amendments, the amount of a decedent's net taxable estate will vary according to the disposition of the estate in direct proportion to the value of the decedent's interest in property passing to the surviving spouse which is allowable as a marital deduction under the limitations of subsection 812 (e)."

It is interesting to note that nowhere in the federal statutes is the "marital deduction" denominated an exemption. That property is not exempt from the tax; it was only separated from the taxable property. The marital deduction is allowable only to the extent that such interest is included in determining the value of the gross estate. In the estate of the surviving spouse it does not qualify under section 812 (c) as property previously taxed. That section provides in part:

"The following property shall not, for the purposes of this subsection (property previously taxed), be considered as property with respect to which a deduction may be allowed: (A) property received from a prior decedent who died after December 31, 1947, and was at the time of such death the decedent's spouse, (B) property received by gift after the date of the enactment of the Revenue Act

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of 1948 from a donor who at the time of the gift was the decedent's spouse, and (C) property acquired in exchange for property described in clause (A) or (B)."

Thus it is to be noted that the property so received will be subject to the federal estate tax in the estate of the surviving spouse, whereas property passing from the deceased spouse to others will be "property previously taxed" in the estate of such other beneficiaries should they die within a period of five years after the death of such spouse. Section 812 (c) (1).

As stated above it is clear that the plan of federal estate taxation which created the "marital deduction" purports to place a surviving spouse in common-law states on a taxable basis comparable to that of a surviving spouse in states in which the property of married people is considered as community property. The question presented here is whether a surviving spouse, entitled to a "marital deduction" under Section 812 (e), Title 26, U. S. Code, may under the Ohio laws of descent and distribution receive such property free from the impact of the federal taxes.

This court is necessarily relegated to an examination of the pertinent statutes of Ohio under which the distribution to the widow of her share of her husband's estate must be determined. The election which the widow made is authorized by the provisions of Section 10504-55, General Code, which is as follows:

"After the probate of the will and filing of the inventory, appraisement and schedule of debts, the Probate Court on the motion of the executor or administrator, or on its own motion, forthwith shall issue a citation to the surviving spouse, if any, to elect whether to take under the will or under the statute of descent and distribution. In the event of election to take under the statute of descent and dis-

tribution, such spouse shall take not to exceed one-half of the net estate. The election shall be made within one month after service of the citation to elect, or if no citation is issued, within nine months after the appointment of the executor or administrator, whether or not a citation be issued as herein provided. On motion filed before the expiration of such nine months and for good cause shown, the court may allow further time for the making of the election. The election shall be entered on the journal of the court."

The estate which passes to the surviving spouse, by virtue of an election, is determined by the provisions of Section 10503-4, General Code, the pertinent parts of which are as follows:

"When a person dies intestate having title or right to any personal property, or to any real estate or inheritance in this state, such personal property shall be distributed, and such real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

"* * *

"3. If there be a spouse and more than one child, or their lineal descendants, surviving, one-third to the surviving spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes."

The contention of the executors is based in part on the provisions of Sections 10509-181, 10509-182 and 10509-121, General Code.

Section 10509-181, General Code, provides in part as follows:

"When six months have expired after the appointment of the executor or administrator and one month has expired after approval of the inventory, and the surviving

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spouse has made his or her election, and when all debts are paid, except debts not due and payable, and claims rejected within two months or in suit and when provision has been made as prescribed in this chapter for any debts which are not due and payable, the executor or administrator may provide for the payment of such rejected claims and claims in suit, if any, by setting aside enough assets for that purpose, to the satisfaction of and in the manner directed by the Probate Court, and, having done so, may distribute to the legatees entitled thereto under the will (if there be no action pending to set aside the will) or to the distributees entitled thereto by law, in cash or in kind, any part or all of the assets of the estate not set apart as herein provided and not required for any other purpose. Each legatee or distributee shall be liable to return such assets, or the proceeds therefrom, should they be necessary to pay any such rejected claims or claims in suit."

Section 10509-182, General Code, is as follows:

"When nine months have expired after the appointment of the executor or administrator, and the surviving spouse has made his or her election, a legatee or distributee may apply to the Probate Court for an order requiring the executor or administrator to distribute the assets of the estate, either in whole or in part, in cash or in kind. Upon notice to the executor or administrator, the court shall inquire into the condition of the estate, and if all debts and claims have either been paid or adequate provision has been or can be made for their payment, the court shall make such order with reference to distribution of the estate as the condition of the estate and the protection of all parties interested therein may demand. The order of the court shall provide that assets be set aside for the payment of claims rejected within two months or in suit, if any, and

each claimant for whom assets are to be set aside shall be entitled to be fully heard as to the nature and amount of the assets to be set aside for payment of his claim, and as to all other conditions in connection therewith. Each legatee or distributee receiving distribution from the estate shall be liable to return the assets distributed to him, or the proceeds therefrom, should they be necessary to pay such claims. The court, upon its own motion or upon application of the executor or administrator, as a condition precedent to any distribution, may require any legatee or distributee to give bond to the state of Ohio, with surety or sureties approved and in an amount fixed by the court, conditioned as provided in the preceding section or as may be directed by the court. Such bond may be in addition to the assets to be set aside hereunder, if any; or partially or wholly in lieu thereof, as the court shall determine."

These provisions, it is to be noted, require the payment or the securing of the payment of all debts before distribution of the estate.

Section 10509-121, General Code, provides the order in which the debts shall be paid. This section provides:

"Every executor or administrator shall proceed with diligence to pay the debts of the deceased, and shall apply the assets in the following order:

"1. Costs and expenses of administration.

"2. Bill of funeral director not exceeding three hundred and fifty dollars, such funeral expenses other than the bill of the funeral director as are approved by the court.

"3. The allowance made to the widow and children for their support for twelve months.

"4. Debts entitled to a preference under the laws of the United States.

"5. Expenses of the last sickness of the decedent.

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"6. Personal property taxes and obligations for which the decedent was personally liable to the state of Ohio or any subdivision thereof.

"7. Debts for manual labor performed for the deceased within twelve months preceding decedent's death, not exceeding one hundred and fifty dollars to any one person.

"8. Other debts as to which claims have been presented within four months after the appointment of the executor or administrator.

"9. All other debts for which claims have been presented according to law after four months from the appointment of the executor or administrator."

It is the position of the executors that the federal estate tax, under paragraph four of Section 10509-121, General Code, is included in "debts entitled to a preference under the laws of the United States," and that construing these three sections together they are obligated to pay in full the federal estate tax as a debt of the estate before any distribution may be made.

The brief of the executors contains the following:

"These sections necessarily determine the extent of the estate in which either the legatees or 'the distributees entitled thereto by law' may participate. By directing the administrators to pay debts and by forbidding distribution until debts are paid, the Legislature has fixed the ultimate estate which may be distributed, whether the distributees take the residue under a will or are entitled by law to take the distributable estate as widow and children of an intestate or as a widow who has elected against the will."

The decision of the Probate Court, approved and adopted by the Court of Appeals, places reliance on the decision of this court in the case of Young Men's Christian Assn. v.

Davis, 106 Ohio St., 366, 140 N. E., 114. The syllabus of that case is as follows:

"1. The tax or excise provided for by the federal Act of 1918, entitled an 'estate tax,' is a legal charge made upon the decedent's estate and his right to transmit it either by will or by law as an intestate.

"2. The charges imposed by law upon an estate must first be paid out of the estate as a whole, before payment of the charges imposed upon the estate by the will of the testator.

"3. A residuary devisee or legatee is presumed in law to be in the position of the last lienholder, after all prior lawful claims and charges have been satisfied out of the estate."

The judgment in that case was affirmed by the Supreme Court of the United States in Young Men's Christian Assn. of Columbus, Ohio, v. Davis, 264 U. S., 47, 68 L. Ed., 558, 44 S. Ct., 291, the syllabus of which case reads as follows:

"1. The estate tax imposed by the Revenue Act of 1918, c. 18, 40 Stat. 1096, is not a succession tax upon the benefits received by devisees and legatees, but an excise or death duty upon the transfer of the decedent's estate.

"2. In providing that bequests to religious and charitable corporations shall be deducted in determining the value of the net estate upon which the tax is imposed, section 403, (3), the act does not undertake to exempt the recipients of such charitable gifts from the burden of the tax if placed upon them by the will.

"3. Hence, where the charitable gifts are residuary, and are duly taken into account in ascertaining the net taxable estate and the amount of the tax, the act offers no obstacle to charging the tax, with other costs and expenses, against the gross estate and satisfying specific devises and bequests in full, before the charitable gifts are satisfied."

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An examination of the opinion of this court in the Y. M. C. A. case, supra, discloses that the cause originated as an action for the construction of a will and for advice and direction of the court as to the federal estate tax and the distribution of the assets of the estate. The will in question had numerous specific bequests and devises to relatives and friends, and then by residuary clause gave "all the rest, residue, and remainder" of the estate to certain charitable, religious and educational institutions. The controversy involved in that case was whether the residuary legatees could be required to pay the federal estate tax since a deduction was allowed for the charitable bequests. In the opinion of the court it is stated:

"It would be a strange legal paradox, indeed, to hold residuary devises, legacies or bounties prior to those that are express and specific. The plaintiffs in error are designated for the first time in item 10, after all specific devises and legacies have been provided for, in the following language: 'All the rest, residue and remainder of my estate and property, real, personal and mixed, of every nature and description, or wheresoever situate * * * I give, devise and bequeath to The Young Men's Christian Association,' etc. This fact affords a clear and conclusive presumption that all charges imposed by the law or by the testator should be paid out of the estate before any right should ripen in behalf of the residuary devisees or legatees under this item.

"This view supports the undoubted intention of the testator in the making of the will in all its various provisions, as well as the plain provisions of the federal statute."

The gist of the decision of the Probate Court in the instant case is found in the following statement in the opinion of that court:

"We come now to the question of how the share of the widow in this case is to be determined under the Ohio law.

The widow elected to take under the statute of descent and distribution by virtue of Section 10504-55, General Code, which section provides that 'in the event of election to take under the statute of descent and distribution, such spouse shall take not to exceed one-half of the net estate.'

"But under Section 10503-4, General Code, the statute of descent and distribution, the widow is limited to a one-third share. So instead of the widow taking one-half of the net estate she takes one-third of the net estate, the decedent having left two children. Under our statutes governing administration and distribution of estates, the net estate for distribution is not determined until all claims and charges against the estate are satisfied; these include the cost and expenses of administration, funeral bill, statutory allowances to the surviving spouse, debts and taxes, including estate taxes. As to estate taxes being a charge against the estate see the case of Tax Commission v. Lamprecht, 107 Ohio St., 535, cited with approval in In Re Estate of Gatch, 153 Ohio St., 401."

The full statement of the applicable federal and state statutes set forth herein discloses the absence of any specific legislative provision controlling or affecting the determination of the question presented. Likewise the Y.M.C.A. case, supra, relied on by the executors is of limited pertinence since that case was decided prior to the enactment of Section 812 (e) and involved only the construction of a will and hence presented no question of federal estate taxes where distribution is made under the statute of descent and distribution. From our examination of the authorities we are convinced that an entirely new question is presented in this case on which there is neither specific legislation nor applicable decisions of this court.

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The General Assembly has recognized the possibilities of such situations as are presented in this case. Section 10501-53, General Code, provides in part as follows:

"Except as hereinafter provided, the Probate Court shall have jurisdiction:

"* * *

"3. To direct and control the conduct, and settle the accounts of executors and administrators, and order the distribution of estates:

"* * *

"13. To direct and control the conduct of fiduciaries and settle their accounts.

"Such jurisdiction shall be exclusive in the Probate Court unless otherwise provided by law.

"The Probate Court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute."

This case presents a much broader question than the ultimate amount which the widow is entitled to receive by reason of her election to take under the statute of descent and distribution. The portion of the estate to which she is entitled cannot be determined unless and until the Probate Court shall have complied with the provisions of the Internal Revenue Act levying the federal estate tax. Prior to the establishment of the "marital deduction," the Internal Revenue Act made no differentiation based on the relationship of a beneficiary, but by virtue of the statutes under which the federal estate tax is now levied the liability for the tax based on the portion of the property of a deceased spouse which by inheritance or otherwise passes to the surviving spouse, within the limitations therein prescribed, is postponed; thus there being recognized for tax purposes some degree of joint ownership in the property of the de-

ceased. It would certainly seem to follow that, in the absence of express statutory authority denying the right, a surviving spouse is entitled to acquire all the rights of deferment of the tax expressly conferred by the federal estate tax law. The policy of this state evidenced by the statute of descent and distribution and cognate statutory provisions is to safeguard the interests of the surviving spouse.

The application of fundamental principles of equity in the situation here presented would be in accordance with the established legislative policy.

The Y. M. C. A. case, supra, is in accord with the general rule as disclosed by the weight of authority throughout the United States but it should again be emphasized that in the instant case no question of testamentary distribution of estates is involved. The estate passing to the widow is nontestamentary and the decision herein is thus limited. This is so for the reason that in each instance where the disposition of property is by will the duty devolves upon the court to ascertain from the instrument itself, if possible, the intent of the testator as to the burden of the federal estate taxes.

The Internal Revenue Act contemplates that federal estate taxes be levied on property which under its provisions constitute part of a gross estate of a decedent but over which the executors or administrators have no authority, such as trust property subject to the power of appointment by someone other than the decedent (Section 811 [f] [2], Title 26, U. S. Code) and the proceeds of insurance on the life of the decedent payable to beneficiaries (Section 811 [g], Title 26). In such instances the executor or administrator is authorized to require contribution from such recipients to the extent of the federal estate tax assessed by reason

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of such property, excepting however where the property in question forms part of a "marital deduction." Thus it must be noted that under the provisions of the federal estate tax law itself, some apportionment is authorized.

However, the instances referred to are not the only ones where the federal estate tax is assessed on property which does not constitute part of the estate in the hands of the executor or administrator. Another example appears in the case of Industrial Trust Co. v. Budlong (R. I., November 10, 1950), 76 A. (2d), 600. In that case certain inter vivos trusts created by the testator were held to constitute part of the gross estate for the assessment of the federal estate tax. Likewise, however, such trust estates were not part of the decedent's estate in the hands of his personal representatives. The question presented there was whether the estate might recover from the beneficiaries of the inter vivos trusts that part of the federal estate tax which resulted from the inclusion thereof in the gross estate.

The court held that in the absence of any clearly expressed intent in the will to the contrary such federal taxes should be borne by the trusts and not the residuary estate.

That holding, in our opinion, discloses a proper application of equitable principles for the purpose of preventing injustice to some heirs and unjustified windfalls to others. The rule suggested by the cases cited, and the cases referred to therein, may be summarized as follows: In the absence of a testamentary direction to the contrary the federal estate tax on all the property within the testamentary estate will be paid from the residue while all non-testamentary interests will bear only the burden of estate taxes attributed to them. (See discussion of the Industrial Trust Co. case in 31 Boston University Law Review, 233.)

It should be borne in mind that in the instant case the estate which the widow takes passes to her not by the will

but as a result of her election not to take under the will. By reason of such election she takes under the statute of descent and distribution and, therefore, the provisions of the will are entirely immaterial in the determination of her rights.

The executors argue that since Ohio has not adopted a statute providing for the apportionment of federal estate taxes, the Probate Court has no authority to do so. It should be observed that the apportionment statutes adopted by various states usually extend their operation to the division of the federal estate tax not only between those who take by intestate succession but between specific legatees and the general residuary legatees. Such statutes are contrary to the implication that federal estate taxes are to be paid by the residuary estate resulting from the failure of the testator to direct a division of the estate taxes. The power to make apportionment in such cases has been exercised by the courts before the adoption of apportionment statutes. See Gaede, Exr. and Trustee, v. Carroll, 114 N. J. Eq., 524, 169A., 172. However the absence of such a statute in Ohio does not deprive the Probate Court of authority to make such apportionment as to intestate estates.

A recent case particularly in point is Lincoln Bank & Trust Co. v. Huber (Ken., May 29, 1951), 240 S. W. (2d), 89. The facts in that case were similar to those involved in the instant case. That was an action for a declaratory judgment to determine a question of taxation. The plaintiff's husband died testate and she renounced the provisions of the will and instituted the action to recover from the executor her statutory one-half interest in the surplus personalty left by the decedent without any reduction by reason of an apportionment of federal estate taxes based upon the decedent's taxable estate. She also sought the

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benefit of the "marital deduction," provided for in the Internal Revenue Act. The court held that she took her share of the decedent's estate free from the burden of federal taxes for the reason that the apparent purpose of the enactment of the "marital deduction" was to equalize the estate tax in non-community-property states with that in community-property states and to prepare the way for the elimination from the tax burden all those whose legacies or allotments do not create or add to the tax; and that, if the marital allotment is a deductible item before arriving at the net taxable estate and does not add to the tax, it cannot be burdened with any portion of the federal estate tax.

The court recognized the fact that it had in previous cases applied a rule of equitable apportionment and the decision follows the well established rule in Kentucky. That case is also authority for the recognition of the common-law rule that courts may make such apportionments in the exercise of their equity powers.

In the instant case the executors required the widow to pay out of her portion of the estate approximately $148,000 as her claimed share of the federal estate tax despite the fact that the assets comprising her portion of the estate were not subject to the tax. This computation had the effect not only of reducing the amount of the federal estate tax which would have been chargeable to the shares taken by the children under the will, but such method also resulted in increasing the total amount of the federal tax chargeable against the gross estate by approximately $50,000 above the amount which would have been assessed if the widow's intestate share of one-third as a "marital deduction" bore no part of the federal estate tax. That fact alone discloses that the computation made in the instant

case was inequitable and was not in accord with the clearly expressed plan and purpose of the provisions of the Internal Revenue Act.

It is our conclusion that, under the provisions of Section 10503-4, General Code, the widow upon her election became entitled to a one-third interest "to any personal property, or to any real estate or inheritance in this state, • • • except as otherwise provided by law"; that the provisions of Sections 10509-121, 10509-181 and 10509-182, General Code, contain no requirement that such widow pay from her share of the estate any federal taxes not directly assessed by reason of her inheritance; and that the Probate Court, in the exercise of its equity power conferred upon the court by Section 10501-53, General Code, in the distribution of intestate property should award such widow her statutory share of such estate with only such deduction of federal estate taxes which directly result from the passing of her portion of the estate.

In this case the widow being entitled to one-third of the decedent's estate will receive less than the maximum marital deduction authorized by the Internal Revenue Act and, therefore, no federal estate tax is deductible from her portion of the estate.

The judgment of the Court of Appeals is reversed and the cause remanded to the Probate Court for further proceedings in accordance with this opinion.

Judgment reversed.

Weygandt, C. J., Stewart, Middleton and Hart, JJ., concur.

Taft, J., dissenting. I regret that I cannot agree with the conclusion reached by the majority in this case. It is unfortunate that the conclusion reached by the Probate Court and the Court of Appeals would require a payment

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of $50,000 more on account of federal estate tax than does the conclusion reached by the majority. On the other hand, it should be observed that, using the figures set forth in the widow's brief, the latter conclusion will result in the children of the testator, the wife of one of those children and the decendents of those children receiving from the testator about $99,000 less than they would receive if the widow received only one-third of what was left in the estate after payment of federal estate tax.*

The rights of the widow are admittedly dependent upon the provisions of Section 10504-55, General Code, providing that she may "elect whether to take under the will or under the statute of descent and distribution" and on the provisions of the statutes of descent and distribution. The applicable portion of the latter statutes is Section 10503-4, General Code, which provides so far as material:

"When a person dies intestate having title or right to any personal property, or to any real estate or inheritance in this state, such personal property shall be *distributed*, and such real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

"* * *

"3. If there be a spouse and more than one child, or their lineal descendants, surviving, *one-third* to the surviving *spouse* and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes." (Italics supplied)

By directing administrators and executors to pay debts and by forbidding distribution until debts are paid, the General Assembly has clearly limited and fixed what may be distributed, whether the distributees take under a will,

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*See footnote page 58.

or are entitled by law to take as widow and children of an intestate or as a widow who has elected against the will.

Both parties agree that the statutes of this state require an executor or an administrator to pay the federal estate tax out of the assets of the estate or make provision for its payment before distribution of those assets can be made. See Sections 10509-121, 10509-181, 10509-182, General Code, and Tax Commission, ex rel. Price, Atty. Genl., v. Lamprecht, Admr., 107 Ohio St., 535, 140 N. E., 333, 31 A. L. R., 985; Davidson v. Miners & Mechanics Savings & Trust Co., Exr., 129 Ohio St., 418, 430, 195 N. E., 845, 98 A. L. R., 1318.

When the General Assembly directed that an estate "shall be distributed" in thirds to a widow and two children it was obviously directing a division of the assets which were available for distribution,—that is, the balance of assets remaining after the personal representative had satisfied the requirements of the statutes, including the requirement that the estate tax be paid.

The conclusion reached by the majority results in the widow receiving $198,000 more as her one-third share than will be received by those entitled to either of the other one-third shares of the assets then available for distribution.*

*The net estate, before deducting the federal estate tax, was $2,086,537. The widow claims one-third of that amount or $695,512. In order to determine what each other third available for distribution would be if the widow's contentions are followed, it is necessary to deduct from the $2,086,537 net estate before federal estate tax the $695,512 claimed by the widow and the federal estate tax of $396,000. This leaves a balance available for the other two-thirds shares of $995,025. In order to determine what each of the two other one-third shares would receive, that figure is divided by two. Thus, each of the two other one-third shares would amount to $497,512. Deducting that amount from the one-third share claimed by the widow of $695,512 discloses that the share to which the widow claims to be entitled would exceed each of the other one-third shares by $198,000.

If the Probate Court's decision is followed, then the federal estate tax would be increased from $396,000 to $446,000. To determine the

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To thus give her more than a one-third share of the remaining assets requires the executors not to divide in three equal parts assets which are available for distribution but to give much more than a third of such assets to the widow at the expense of those entitled under the statute to the other two-thirds.

In effect, this conclusion of the majority amends the statutes of descent and distribution by enabling the widow to receive not merely the one-third of the distributable assets which the General Assembly has stated that she shall receive but a portion substantially greater than that one-third. There is certainly no enactment of the General Assembly which authorizes such a distribution.

Almost every argument that can be made in support of such a conclusion necessarily is based upon a contention that Congress intended such a result. The most obvious answer to any such contention is that the General Assem-

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amount available for distribution, $446,000 would then be deducted from the net estate before federal taxes of $2,086,537. The result would be $1,640,537 available for distribution in thirds. Each one-third of that figure would be $546,845. That would be the widow's one-third share and would be the amount of each of the other one-third shares. Since, if the widow's contentions are followed, each of the other one-third shares would amount to only $497,512, that amount deducted from $546,845 shows that those entitled to each of the other one-third shares, other than the widow's one-third share, would get $49,333 less under the widow's contentions than they would under the Probate Court's decision. This would mean that the testator's children, the wife of one of those children, and the descendants of those children would take under the widow's contentions a total of $98,666 (twice $49,333) less than they would have received under the Probate Court's decision.

Under the Probate Court's decision, the widow's one-third share would be the same in amount as the one-third share of each of the others. However, under the widow's contentions her one-third share would exceed in amount each of the other one-third shares by $198,000. That amount would be almost 40 per cent of the $497,512 amount available for each of the other one-third shares. In other words, under her contentions, she would receive as her one-third share almost 40 per cent more than that received on account of each of the other one-third shares.

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bly of Ohio and not the Congress of the United States determines the extent of the share of a widow or widower in the assets of the estate of one who dies a resident of Ohio. See Riggs, Gdn., v. Del Drago, 317 U. S., 95, 87 L. Ed., 106, 63 S. Ct., 109. Furthermore, in enacting the subsection of the statute providing for the marital deduction (Section 812 [e], Title 26, U. S. Code), Congress disclaimed any intention that the marital deduction should not be burdened by the tax. Thus, in that subsection, in defining the marital deduction, it is stated:

"(E) Valuation of interest to surviving spouse. In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

"(i) there should be taken into account the effect which a *tax imposed by this chapter* * * * has upon the net value to the surviving spouse of such interest * * *." (Italics supplied)

The words "a tax imposed by this chapter" refer to the tax imposed by the chapter on the estate tax.

The only authority cited in the majority opinion as "particularly in point" is Lincoln Bank & Trust Co. v. Huber (Ky. 1951), 240 S. W. (2d), 89. As the majority states, that decision was at least in part based upon the conclusion of the Kentucky court that Congress intended such a result. As the majority opinion further states, the Kentucky decision also follows the well established rule in Kentucky of equitable apportionment. That that rule, apart from statute, is peculiar to Kentucky appears from the note in 31 Boston University Law Review, 233, 234, cited in the majority opinion, where it is said:

"By the common law it was uniformly held that the residuary estate was to bear the brunt of all estate taxes and the

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executor was not entitled to reimbursement from the donee of an inter vivos transfer. On the other hand, those states which have adopted apportionment statutes prorate the federal estate tax amongst all the interested parties. Persons interested in the estate are defined as those persons who may be entitled to receive or who have received or who are the beneficiaries of property or of an interest which is required to be included in the taxable gross estate. Kentucky has arrived at the same result by court decision."

It should be noted further that the statutory situation in Kentucky differs substantially from that in Ohio. In Kentucky, the statute gives the widow a share in the "husband's surplus personalty" and the amount of "surplus personalty" is determined before deduction of the federal estate tax. Hampton's Admrs. v. Hampton (Ky), 221 S. W., 496, 10 A. L. R., 515, 518. However, as hereinbefore pointed out, the widow's share under our statutes is a share in the amount available for distribution which, under our statutes, cannot be determined until after payment of the federal estate tax.

It has been argued that to follow the decisions of the Probate Court and the Court of Appeals would prevent the achievement of at least substantial equality, so far as the federal estate tax is concerned, between those who reside in community-property states and those who do not. However, both parties concede that by will an Ohio testator can now secure all the advantages, so far as reduction in his federal estate tax is concerned, that he could have in a community-property state. On the other hand, he is not subject to the disadvantages which he would have in disposing of his property if he resided in a community-property state. One spouse may not desire the other to get as much of his or her property as he or she would be

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entitled to in a community-property state. A spouse residing in Ohio may satisfy this desire except to the extent that the Ohio statutes give an election to take against a will. If the decisions of the Probate Court and the Court of Appeals are followed, then a testator in this state will have been given an opportunity to get all the benefits, from the standpoint of reducing his estate tax, that he could have secured if he had resided in a community-property state. On the other hand, he will not have been subject to the disadvantages of the laws relating to community property, to which he would be subjected if he resided in a community-property state.

Although the widow has endeavored to distinguish the decision of Young Men's Christian Assn. v. Davis, 264 U. S., 47, 68 L. Ed., 558, 44 S. Ct., 291, affirming 106 Ohio St., 366, 140 N. E., 114, she concedes that it is "authority for the proposition that in the construction of a will, where the testator has failed to state where he wishes the burden of the estate tax to fall, it will be presumed that it was his intention that it fall upon residuary rather than specific legacies and devisees." The Davis case clearly does hold this and it holds it for the reason that, where the testator has specifically provided for certain legatees and then left the balance of his estate to some other legatees, he has shown a preference for the specific legatees and thereby disclosed an intention in his will that they should not be required to bear the burden of the estate tax.

In the instant case, the testator certainly provided specifically in his will not only for his widow but for the others who were to take under his will. As to the principal portion of his property, his will divided his estate into four shares and gave his widow a life estate in only two of those shares. Under the will the other two shares and the re-

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mainder after his widow's life estate were to go to his children, the wife of one of his children and his children's descendants. There is certainly nothing in the will which would justify an inference or a presumption that the testator intended that his widow was to bear no share of the estate tax burden. On the contrary, the will specifically indicates an intention that she was to get less than the one-third share of his net estate which the law gives her if she elects against the will. It would seem to follow that, even if Y. M. C. A. v. Davis, supra, is an authority only to the limited extent conceded by the widow, that decision would require an affirmance in the instant case.

APPENDIX C.

United States Revenue Act of 1948.

To reduce individual income tax payments, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, divided into titles and sections according to the following Table of Contents, may be cited as the "Revenue Act of 1948":

Table of Contents.

* * * *

Title I—Income tax reduction.

* * * *

Title II—Credits against net income for normal tax and surtax.

* * * *

Title III—Husband and wife.

Part I—Income tax.

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Part II—Estate tax.

Subpart 1.—Repeal of 1942 community property amendments.

Sec. 351. Repeal of community property estate tax amendments.

* * * *

Subpart 2—Marital Deduction for Bequests, Etc., to Spouse.

Sec. 361. Marital Deduction.

(a) Section 812 of the Internal Revenue Code (relating to deductions in computing net estate in the case of a citizen or resident of the United States) is hereby amended by adding at the end thereof a new subsection to read as follows:

"(e) Bequests, Etc., to Surviving Spouse.—

"(1) Allowance of marital deduction.—

"(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part

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of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

"(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

"(C) Interest in Unidentified Assets.—Where the assets (included in the decedent's gross estate) out of which, or the proceeds of which, an interest passing to the surviving spouse may be satisfied include a particular asset or assets with respect to which no deduction would be allowed if such asset or assets passed from the decedent to such spouse, then the value of such interest passing to such spouse shall, for the purposes of subparagraph (A), be reduced by the aggregate value of such particular assets.

"(D) Interest of Spouse Conditional on Survival for Limited Period.—For the purposes of subparagraph (B) an interest passing to the surviving spouse shall not be considered as an interest which will terminate or fail upon the death of such spouse if—

"(i) such death will cause a termination or failure of such interest only if it occurs within a period not exceeding six months after the decedent's death, or only if it occurs as a result of a common disaster

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resulting in the death of the decedent and the surviving spouse, or only if it occurs in the case of either such events; and

"(ii) such termination or failure does not in fact occur.

"(E) Valuation of Interest Passing to Surviving Spouse.—In determining for the purposes of subparagraph (A) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this subsection—

"(i) there shall be taken into account the effect which a tax imposed by this chapter, or any estate, succession, legacy, or inheritance tax, has upon the net value to the surviving spouse of such interest; and

"(ii) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

"(F) Trust with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust the surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and

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with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

"(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

"(ii) no part of the interest so passing shall, for the purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * * * * * * *

"(G) Life Insurance with Power of Appointment in Surviving Spouse.

* * * * * * * * * *

"(2) Computation of adjusted gross estate.—

"(A) General Rule.—Except as provided in subparagraph (B) of this paragraph the adjusted gross estate shall, for the purposes of paragraph (1) (H), be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by subsection (b) of this section.

"(B) Special Rule in Cases Involving Community Property.—

* * * * * * * * * *

"(3) Definition.—For the purposes of this subsection an interest in property shall be considered as passing from the decedent to any person if and only if—

"(A) such interest is bequeathed or devised to such person by the decedent; or

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"(B) such interest is inherited by such person from the decedent; or

"(C) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent; or

"(D) such interest has been transferred to such person by the decedent at any time; or

"(E) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship; or

"(F) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default upon the release or nonexercise of such power; or

"(G) such interest consists of proceeds of insurance upon the life of the decedent receivable by such person.

Except as provided in subparagraph (F) or (G) of paragraph (1), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for the purposes of clauses (i) and (ii) of subparagraph (B) of paragraph (1), be considered as passing from the decedent to a person other than the surviving spouse.

"(4) Disclaimers.—

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(b) The amendment made by subsection (a) of this section shall be applicable only with respect to estates of decedents dying after December 31, 1947.

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